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In the Supreme Court of the United States

OCTOBER TERM, 1994

WEST PENN POWER COMPANY, ET AL., PETITIONERS

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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25 pp

QUESTION PRESENTED

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 824a-3, and implementing regulations issued by the Federal Energy Regulatory Commission and the Pennsylvania Public Utility Commission (PUC), require utilities to purchase electricity from qualifying small power production facilities. The required purchase price cannot exceed the incremental cost the utility otherwise would have paid to generate or purchase the electricity. States bear the primary responsibility under PURPA for implementation and enforcement of those requirements. The question presented is:

Whether the Pennsylvania PUC acted within the range of discretion afforded it in implementing PURPA by requiring an electric utility subject to its jurisdiction to purchase power from a qualifying facility at the price the utility had previously agreed to and that the PUC had found was below its incremental costs.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. a. Congress enacted Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. 824a-3, "to encourage the development of cogeneration and small power production facilities," in order to decrease reliance on fossil fuels. *FERC* v. *Mississippi*, 456 U.S. 742, 750 (1982). Small power production facilities are those that have a capacity no greater than 80 megawatts and produce electricity from biomass, waste, or other renewable resources such as wind, water, or solar energy. *Id.* at 750 n.11; 16 U.S.C.

796(17)(A). Congress recognized that the reluctance of traditional electric utilities to purchase power from non-traditional facilities had been an obstacle to the latter's development. 456 U.S. at 750-751.

Section 210(a) of PURPA, 16 U.S.C. 824a-3(a), directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to foster the development of small power production facilities, and specifically to require electric utilities to purchase electric energy from qualifying facilities, or "QFs." See *FERC* v. *Mississippi*, 456 U.S. at 751; 16 U.S.C. 796(17)(C) (defining qualifying facilities). PURPA further directs FERC to issue rules to ensure that the rates for such purchases are "just and reasonable" to the utility's consumers and "in the public interest," and that they do not discriminate against QFs. 16 U.S.C. 824a-3(b)(1). PURPA imposes a ceiling, however, to ensure that ratepayers will not be required to subsidize purchases mandated by PURPA: No FERC rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy," 16 U.S.C. 824a-3(b)—*i.e.*, "the cost to the electric utility of the electric energy which, but for the purchase from [a QF], such utility would generate or purchase from another source." 16 U.S.C. 824a-3(d).

PURPA relies substantially on the States for implementation. Section 210(f) requires that "each State regulatory authority shall * * * implement" the rules adopted by FERC to encourage QF development. 16 U.S.C. 824a-3(f). FERC's rules establish only the basic regulatory framework, and "afford the State regulatory authorities * * * great latitude in determining the manner of implementation of the Commission's rules." 45 Fed. Reg. 12,230-12,231 (1980). "Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's

rules." *FERC* v. *Mississippi*, 456 U.S. at 751. Judicial review of state commissions' decisions under PURPA is generally limited to the state courts. 16 U.S.C. 824a-3(g); see Pet. 16 & n.6; H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 84 (1978) ("The findings and determinations by the courts are reviewable under the substantive standards of review as established under State law.").

FERC's regulations require utilities to buy electricity made available by QFs at the "full avoided cost." See 18 C.F.R. 292.304.[1] That rule, which was sustained in *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 412-418 (1983), does not provide immediate savings to consumers, because it requires utilities to pay QFs the same rate they would otherwise pay for electric energy. This Court held, however, that FERC reasonably placed greater emphasis on the need to maximize the incentives for development of small power production, to the long-term benefit of consumers and the Nation. *Id.* at 415-416.

FERC's regulations establish two methods for calculating full avoided costs. First, if a QF provides energy as it becomes available for sale, the utility must purchase it at a rate "based on the purchasing utility's avoided costs calculated at the time of delivery." 18 C.F.R. 292.304(d)(1). Second, if a QF assumes "a legally enforceable obligation for the delivery of energy or capacity over a specified term," the QF may decide, before the beginning of the specified term, to base the rate on the utility's avoided costs calculated either "at the time of delivery" or "at the time the obligation is incurred." 18 C.F.R. 292.304(d)(2). FERC's regulations provide that rates "based upon estimates of avoided costs over the specific term of the contract or other legally enforceable

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[1] A state regulatory commission may authorize a lower rate if it finds that the rate "is sufficient to encourage cogeneration and small power production." 18 C.F.R. 292.304(b)(3).

obligation" do not violate FERC's regulations even if they ultimately "differ from avoided costs at the time of delivery." 18 C.F.R. 292.304(b)(5).

FERC's regulations also allow a utility and a QF "to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required" by the regulations. 18 C.F.R. 292.301(b)(1); *American Paper Institute*, 461 U.S. at 416 (noting that under Section 292.301(b)(1), "a qualifying facility and a utility may negotiate a contract setting a price that is lower than a full-avoided-cost rate"). The FERC regulation "simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement." *Ibid.*

b. The Pennsylvania Public Utility Commission (PUC) adopted regulations to implement PURPA in 1982. See 52 Pa. Code §§ 57.31 *et seq.*; 12 Pa. Bull. 4237 (1982). Those regulations, which governed this case, establish the procedures for PURPA contracting and prescribe the method for setting rates for utilities' purchase of energy and capacity from QFs. They also require utilities to purchase capacity and energy from QFs on a first-come, first-served basis.

The PUC has, however, proposed new regulations under which QFs would participate in a mandatory competitive bidding process. 24 Pa. Bull. 4101 (1994) (proposed 52 Pa. Code § 57.34(c)); see generally 24 Pa. Bull. 4091-4103 (1994). Bidding procedures would "establish the utility's avoided cost or ceiling rates as well as the means for establishing project reliability." *Id.* at 4091; see *id.* at 4093. The proposed regulations would also encourage "[d]emand-side management," such as conservation programs, as an alternative to developing additional capacity. See *id.* at 4101 (proposed 52 Pa. Code § 57.34(c)(1)(iii)); *id.* at 4100 (proposed 52 Pa. Code § 57.31).

2. In late 1985, respondent Milesburg Energy, Inc., proposed to purchase a retired generating plant from

petitioner West Penn Power Company (West Penn) to establish a 43-megawatt small power production facility fueled by coal waste.[2] In May 1986, Milesburg and West Penn reached an oral agreement in principle on the rates West Penn would pay to purchase capacity and energy from the facility. Pet. App. 23a.[3]

On February 25, 1987, West Penn and Milesburg voluntarily entered into an Electric Energy Purchase Agreement (EEPA), which provided that West Penn would purchase all the capacity and energy from the Milesburg facility for 30 years. West Penn agreed to pay a variable energy charge based on its actual energy costs at specified generation facilities, and it has not challenged that charge. The dispute in this case concerns the capacity charge, which the EEPA fixed at 3.3 cents/kwh. Pet. App. 23a-24a. The parties were not required to use avoided costs in calculating the capacity charge under the contract, but they elected to do so. West Penn calculated the rate at which the present value of capacity payments over the life of the Milesburg project would equal the present value of West Penn's May 1986 estimate of the capacity costs that would be delayed or avoided by the project. West Penn based its estimate of avoided capacity costs on its projection that the next facilities it would need to construct would be three coal-fired baseload units, the first of which was to be brought on line in 1995. *Id.* at 23a.

West Penn conditioned its obligation under the EEPA on the entry by the Pennsylvania PUC of an order, final and

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[2] FERC has certified the facility as a qualifying small power production facility. *Milesburg Energy, Inc.*, 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 62,050 (1988).

[3] Capacity costs are overhead costs associated with providing the capability to deliver energy, and are comprised primarily of capital costs; energy costs are the variable costs of power generation, including the costs of fuel and some operating and maintenance expenses. Pet. App. 64a n.4.

beyond appeal, approving the terms of the EEPA and authorizing West Penn to recover all costs it would incur under the EEPA. Pet. App. 24a. On April 2, 1987, West Penn filed a petition for PUC approval, and on September 22, 1987, the PUC granted the petition. *Id.* at 48a-59a. The PUC determined that the proposed project was environmentally and socially beneficial, *id.* at 51a, and that "the present value of the capacity payments to [Milesburg] is well below West Penn's calculated value of the capacity assumed to be delayed or avoided," *id.* at 53a.[4] Two of West Penn's large industrial customers, petitioners Armco, Inc., and Allegheny Ludlum Corp., and the Office of Consumer Advocate appealed. *Id.* at 61a.

Eleven months later, on August 22, 1988, the Commonwealth Court vacated and remanded. Pet. App. 60a-90a (*Milesburg I*). The court determined that West Penn's customers had a substantial property right in utility rates that would be affected by any agreement between Milesburg and West Penn, and it accordingly held that the PUC was required to give them notice and an opportunity for a hearing prior to approval of the rates.

3. The delay in the regulatory review process threatened to undo the parties' agreement. The EEPA contained a series of milestone dates by which certain actions had to be completed. One milestone was the "Financing Closing Date," by which Milesburg was to close its initial construction financing. If the closing did not occur before September 1, 1988, the EEPA would expire by its own terms. Milesburg could not meet that deadline in the absence of West Penn's purchase commitment, which remained dependent on PUC approval. In those circumstances, the parties entered into a

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[4] The PUC determined that the full avoided cost would have been 4.76 cents/kwh, as compared with the contract rate of 3.3 cents/kwh. Pet. App. 52a.

consent order, approved by the PUC on September 1, 1988, extending the Financing Closing Date to February 28, 1989. Pet. App. 91a-96a.

On February 9, 1989, as the extended Financing Closing Date approached, Milesburg filed a petition under Section 508 of the Pennsylvania Public Utility Code, 66 Pa. Cons. Stat. Ann. § 508 (1979), requesting that the PUC modify the EEPA in two respects: (1) to extend the Financing Closing Date to 120 days after entry of a final nonappealable PUC order approving the EEPA, and (2) to increase the capacity payments from 3.3 to 4.9 cents/kwh to reflect a projected start-up date of 1993, rather than 1990, due to the regulatory delay. Pet. App. 26a, 110a-112a. On February 21, 1989, the ALJ granted Milesburg's request to extend the milestone dates and update the capacity rate, *id.* at 26a, 110a-112a, but on February 27 he rescinded that order because it was issued without a hearing required by state law, *id.* at 26a, 113a.

The extended deadline then passed on February 28, 1989. On March 31, 1989, the PUC denied Milesburg's request for emergency relief, but ordered the parties to maintain the status quo regarding the EEPA while the administrative law judge (ALJ) and the PUC considered Milesburg's petition for modification. Pet. App. 26a, 114a-126a. In the meantime, West Penn moved to withdraw its approval petition because the EEPA had lapsed, and Armco and Allegheny Ludlum similarly moved to dismiss that petition. *Id.* at 26a.

4. The ALJ held hearings, in accordance with *Milesburg I*, in April 1989. "Phase I" concerned West Penn's April 1987 petition for approval of the EEPA, in which the only contested issue was whether the capacity payments were below West Penn's avoided costs (an issue that included the date from which avoided costs should be projected). The ALJ concluded that the capacity rate in the EEPA was reasonable and below West Penn's avoided costs as of May 1986, the date of the parties' first "serious negotiations." Pet. App. 153a-211a.

"Phase II" addressed issues arising from the regulatory delay, including Milesburg's petition to modify the EEPA's milestone dates and capacity charge. The ALJ recommended that Milesburg's petition be denied, on the ground that the EEPA had lapsed and thus was no longer subject to modification by the PUC under state law, *id.* at 212a-219a, but he suggested that Milesburg could petition the PUC to order West Penn to purchase power as required by PURPA, *id.* at 218a.

5. On September 29, 1989, the PUC issued an opinion and order denying West Penn's petition to withdraw its approval petition, and granting both the approval petition and Milesburg's petition for modification. Pet. App. 244a-294a. As to Phase I, the PUC agreed with the ALJ that the capacity cost was reasonable, because it was below West Penn's estimate of its avoided costs as of the time the parties reached agreement in principle during "serious negotiations." *Id.* at 247a-277a.

As to Phase II, the PUC agreed with the ALJ that the EEPA had lapsed and that Milesburg's proposed modification of the EEPA under state law therefore was moot. Pet. App. 287a. But it rejected the ALJ's recommendation that Milesburg be required to file a new petition to require West Penn to purchase power. *Id.* at 281a-289a. The PUC found that a "legally enforceable obligation" already existed for purposes of PURPA, *id.* at 287a, and it therefore ordered West Penn to enter into a new agreement to purchase power from Milesburg. The PUC explained (*id.* at 287a-288a):

> Milesburg has been endeavoring to obtain an approved power purchase agreement with West Penn since 1986. Although West Penn does not have a legally enforceable obligation to purchase power under the lapsed 1987 EEPA, it does have a legally enforceable obligation under [Section 210 of PURPA] to purchase Milesburg's power at

> rates determined in accordance with West Penn's avoided cost projections in effect in 1986. The Commission has the responsibility to enforce the provisions of [Section 210 of PURPA] in Pennsylvania. Milesburg has requested rates based on West Penn's methodology, which we have determined to be the appropriate benchmark of avoided costs in these proceedings. Milesburg has done nothing to waive its entitlement to rates based on avoided costs as of the time of serious negotiations. Therefore, it is our responsibility to require West Penn to enter into a new EEPA with Milesburg, identical in terms with the lapsed EEPA, with extensions to the milestone dates and revised capacity rates that reflect the Project's later in-service date. Specifically, we will require a financing closing date six months after the issuance of a final nonappealable Order, with similar extensions to related milestones.

6. West Penn did not appeal the PUC's determination of the capacity rate, but it did appeal the PUC's decision to treat the EEPA as a petition by Milesburg for a mandatory purchase order under PURPA. Armco and Allegheny Ludlum appealed the PUC's rulings on both issues. In a decision issued July 17, 1990, the Commonwealth Court affirmed in part and modified in part. Pet. App. 18a-46a.

The court first held that the PUC, in approving the power purchase agreement, should calculate avoided capacity costs as of the date the EEPA was executed, on February 25, 1987, rather than at the time of the parties' serious negotiations, as the PUC had required. Pet. App. 28a-35a. The court viewed Milesburg's agreement to the original EEPA as the point at which it first incurred a "legally enforceable obligation" for the delivery of energy or capacity. *Id.* at 29a-30a. "Although the 'legally enforceable obligation' language does permit a QF to lock in avoided cost projections even without a contract from a recalcitrant utility, the phrase does not encompass a

QF that has incurred no obligation at all." *Id.* at 31a. The court remanded "with instructions that the PUC calculate [Milesburg's] capacity cost credit according to West Penn's method, using inputs appropriate for the time when West Penn and [Milesburg] executed their contract." *Id.* at 41a. The PUC has not yet completed that recalculation.

At the same time, the Commonwealth Court affirmed the PUC's decision to require West Penn to purchase electric energy from Milesburg even though the EEPA had lapsed. Pet. App. 35a-41a. The court noted that "FERC has granted state PUCs broad authority to accomplish the purposes of § 210 of PURPA, so long as their actions are consistent with the FERC regulations," *id.* at 37a, and it held that the PUC's actions were within the bounds of the discretion afforded by PURPA, *id.* at 39a-40a. The court concluded that although regulatory delay prevented the EEPA from becoming effective as a voluntary contract between the parties, Milesburg's execution of the contract and its submission to the PUC were sufficient to constitute a "legally enforceable obligation" on the part of Milesburg, so as to trigger West Penn's independent statutory duty to purchase power:

> Where a QF has done everything within its power to create such an obligation, either by tendering a contract to the utility or by petitioning the PUC to approve a contract or to compel a purchase, and only an act of acceptance by the utility or an act of approval by the PUC remains to establish the existence of a "contract", then the "legally enforceable obligation" contemplated by [18 C.F.R.] § 292.304(d)(2) has been created, and the QF is entitled to rates based on avoided costs calculated from the date of the QF's action.

Id. at 34a. The court held that "[a] utility's submission of its contract with a QF to the PUC for approval is legally

equivalent to a petition by the QF to the PUC to compel the utility to enter into that contract." *Id.* at 37a.

7. The PUC appealed the Commonwealth Court's modification of the PUC's Phase I decision, and West Penn, Armco and Allegheny Ludlum appealed the court's affirmance of the PUC's Phase II decision. In a one-sentence per curiam order issued on November 24, 1993, the Pennsylvania Supreme Court affirmed the Commonwealth Court in all respects. Pet. App. 1a-3a. Three of the six voting justices disagreed with the Commonwealth Court's ruling that a legally enforceable obligation did not exist until Milesburg signed the EEPA on February 25, 1987, stating that they would have upheld the PUC's determination of avoided costs as of the date of "serious negotiations" in May 1986. *Id.* at 12a-16a. All six justices, however, voted to affirm the Commonwealth Court's affirmance of the PUC order requiring West Penn to enter into a new purchase agreement with Milesburg. *Id.* at 14a-17a.

DISCUSSION

PURPA neither required nor forbade the particular course chosen by the Pennsylvania PUC and approved by the Pennsylvania courts to treat the petition by West Penn for approval of its contract with Milesburg as the equivalent of a petition by Milesburg for a mandatory-purchase agreement. PURPA establishes the basic requirement that utilities not avoid purchasing electric energy from QFs by refusing to contract with them, but the details of implementation of FERC's regulations governing such purchase obligations are left to the States. Pennsylvania's implementation of the mandatory-purchase requirement and its application of FERC's "legally enforceable obligation" standard in the circumstances of this case rest on essentially fact-bound determinations under Pennsylvania's PURPA procedures, within the broad parameters set by PURPA and FERC's regulations. PURPA does not require uniformity of imple-

mentation among the States, and petitioners have identified no conflict on the issues presented. Review therefore is not warranted.

1. Petitioners contend that the PUC modified the terms of the parties' privately negotiated purchase agreement in violation of FERC regulations, thereby creating a conflict with rulings of other state courts that have "maintained the distinction between negotiated contracts and commission orders to purchase power." Pet. 20. This claim is insubstantial.

a. The PUC did not modify a negotiated contract. Milesburg initially petitioned the PUC under state law to extend the EEPA's milestone dates, but the PUC declined to do so. Instead, it acknowledged that the EEPA had expired and ordered West Penn to enter into a new agreement, in order to enforce West Penn's distinct statutory duty under Section 210 of PURPA. Pet. App. 287a-288a. The Commonwealth Court affirmed the PUC's action, explaining (*id.* at 37a-38a):

> A utility's submission of its contract with a QF to the PUC for approval is legally equivalent to a petition by the QF to the PUC to compel the utility to enter into that contract. In our view, such a petition necessarily invokes the full power and duty of the PUC to examine all of the contract's terms and conditions to ensure that they are in compliance with the FERC regulations implementing PURPA.

The Pennsylvania Supreme Court unanimously affirmed that ruling without opinion. *Id.* at 1a-3a.

As a procedural matter, the PUC's decision to treat the submission of the parties' agreement in that manner was well within the range of discretion afforded to the States to implement PURPA under their existing frameworks of public utility regulation. Petitioners' contention that the PUC thereby impermissibly "dissolv[ed] the distinction between

freely-negotiated agreements and federally-mandated orders to purchase" (Pet. 23) is without merit. There is no issue in this case regarding limits on PUC interference with a valid private contract, both because the proposed contract was submitted to the PUC for approval and because it had expired by its own terms at the time the PUC acted to mandate a power purchase in order to enforce West Penn's independent statutory duty under PURPA. As a result, the potential threats to private contracts under PURPA that petitioners recite (see Pet. 20, 23) are not implicated in this case.

Petitioners do not dispute that the PUC had the authority under PURPA to mandate a purchase agreement between West Penn and Milesburg. See Pet. 4. Rather, they take issue with the PUC's decision to do so in light of the contract that had been submitted to the PUC for approval. By contending that FERC rules "carve out an area for the private negotiation of contracts" (Pet. 23), however, petitioners suggest that even West Penn's unsuccessful attempt to contract privately by conditionally agreeing to an EEPA should have immunized West Penn from any mandatory-purchase obligations under PURPA during the period before that contract fell through. Such a rule would allow a utility to delay or avoid its purchase obligations under PURPA by, for example, voluntarily accepting in principle a QF's proposal to sell electricity, but placing unrealistic preconditions on the contract. The purposes of PURPA could be substantially undermined if the utility could then defend against a PUC mandatory-purchase order based on the QF's original offer, on the ground that "reformation" of the contract to remove the unrealistic conditions would impermissibly intrude into a sphere of voluntary contract. Nothing in FERC's rules supports such a result. Indeed, FERC contemplated the kind of relationship between proposed contracts and mandatory-purchase orders that the PUC found in this case. 45 Fed. Reg. 12,217 (1980) (recognizing "that the

ability of a [QF] to negotiate with an electric utility is buttressed by the existence of the rights and protections" of the mandatory-purchase rules). Where, as here, a QF has done all in its power to contract to sell electricity but has failed to bind the utility, PURPA permits a state commission to provide the means to do so.

Milesburg could have refiled its lapsed contract with West Penn as a petition to the PUC for a mandatory-purchase agreement. The PUC did not require a new filing, however, because to do so "would make no sense," Pet App. 289a, only causing unnecessary delay and potentially higher rates for customers. Exhaustive hearings had already been held on the terms of the EEPA, including its avoided-cost formula. The PUC concluded that "requiring Milesburg to begin anew with another vigorously contested proceeding likely would result in the abandonment of this Project." *Ibid.* Accounting for the regulatory delay by treating the petition for approval of the EEPA as, in the alternative, the equivalent of a petition for a mandated contract once the EEPA lapsed was, in the PUC's view, necessary to avoid a result "contrary to the public interest." *Ibid.* That practical approach is consistent with PURPA and FERC's implementing regulations, and it presents no issue warranting review by this Court.

b. The decisions petitioners cite from other state courts (Pet. 20-23) do not conflict with the summary affirmance by the Pennsylvania Supreme Court in this case. Those decisions recognize that parties may contract on terms that differ from what PURPA otherwise requires. None, however, supports petitioners' position that parties' mere freedom to contract (or their failed effort to do so) divests a state PUC of the authority it otherwise has under PURPA to require a utility to purchase electricity from a QF at a rate not

exceeding avoided costs.[5] The cases petitioners cite deal not with any impact of failed contracts on a state commission's implementation of PURPA, but with the integrity of valid and enforceable contracts.[6]

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[5] In *In re Vicon Recovery Sys.*, 572 A.2d 1355 (1990), the Vermont Supreme Court affirmed the right of parties to enter into agreements on terms different from those that PURPA requires in the absence of a contract; it did not involve any issue of the parties' rights in the absence of a contract. The court upheld the authority of a state commission under state law to modify the rate for purchases under such an agreement, expressly holding, contrary to petitioners' position in this case, that "Congress did not mandate the creation of a zone [of voluntary contract] in which utility activities would be completely unfettered by regulatory oversight." *Id.* at 1358.

[6] *Water Power Co.* v. *PacifiCorp*, 781 P.2d 860 (Or. Ct. App. 1989), review denied, 787 P.2d 887 (Or.), cert. denied, 498 U.S. 811 (1990), unlike this case, was a civil breach of contract action, so the PUC's affirmative power to order compliance with PURPA and implementing federal and state regulations was not at issue. Moreover, under the contract at issue in *Pacificorp.*, the QF bore the burden to bring about the contract's condition precedent and failed to do so by the agreed date. 781 P.2d at 862. There was thus no basis for a finding, analogous to the PUC's finding here, that the QF did everything in its power to meet contract conditions and that delays were caused by the regulatory process itself or by other factors beyond the QF's control.

In *Public Util. Comm'n* v. *Gulf States Utils. Co.*, 809 S.W.2d 201, 209 (1991), the Texas Supreme Court held that FERC and Texas PURPA regulations did not give the Texas commission authority to bar a utility from agreeing to purchase energy from a QF at a rate above its avoided costs, although the utility could not be assured of commission approval to pass through to ratepayers any amounts in excess of avoided costs. *Gulf States* does not support petitioners' broad assertions that parties' efforts to negotiate a power purchase agreement place them beyond the reach of PURPA.

Bates Fabrics Inc. v. *Public Utils. Comm'n*, 447 A.2d 1211, 1214 (Me. 1982), also relied on by petitioners, held that a state commission does not have authority under PURPA and FERC's regulations to increase to full avoided costs the rate in a power purchase agreement between a QF and a

2. Petitioners also ask the Court to "reconcile" what they assert to be "conflicting approaches of state courts to the question of what constitutes a 'legally enforceable obligation' under the FERC rules." Pet. 29-30. The Pennsylvania courts' application of the "legally enforceable obligation" principle in this case presents no issue warranting review by this Court.

The date when Milesburg incurred a "legally enforceable obligation" is of practical significance to the parties because it affects the rates West Penn will pay by setting the date from which future avoided costs are projected. See 18 C.F.R. 292.304(d)(2)(ii). To the extent that West Penn's forecast of its own needs and of the costs of fulfilling them change over time, more recent or earlier projections would differ from the February 25, 1987, projection accepted by the courts below.

Petitioners have in the course of this litigation proposed at least three different dates when Milesburg incurred a legally enforceable obligation. West Penn successfully argued to the PUC that the appropriate date was May 7, 1986, when the parties were engaged in serious negotiations and agreed in principle on price. Armco and Allegheny Ludlum successfully argued to the Commonwealth Court that the appropriate date was February 25, 1987, when the parties signed the EEPA. The industrial ratepayers preferred that date at the time because of intervening tax changes that benefitted them. See Pet. App. 13a. The February 25, 1987, date was affirmed by an equally divided Pennsylvania Supreme Court, over a dissent in favor of the "serious negotiations" date. *Id.* at 1a-17a. Petitioners now propose a third date, September 22, 1989, when the PUC entered its order directing West Penn to

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utility that was executed before PURPA was enacted. *Bates* relied on FERC's determination that pre-PURPA contracts are not affected by the Act, see *id.* at 1214, and its holding is irrelevant to the post-PURPA power purchase agreement at issue here.

purchase energy from Milesburg. See Pet. 4. In support of that new date, petitioners refer to a "confluence of economic factors" (Pet. 28) that has created a "falling avoided-cost market" (Pet. 29) and makes their 1986 agreement with Milesburg more expensive than it would be if costs were calculated as of September 22, 1989.

Petitioners' new (and extra-record) objections to the costs to ratepayers and the February 1987 date are misdirected and unfounded. FERC and the PUC, not this Court, are charged with ensuring that any rates are "just and reasonable" to the utility's customers and "in the public interest," 16 U.S.C. 824a-3(b)(1) and (f). This Court has approved FERC's avoided-cost rule under that standard, *American Paper Institute*, 461 U.S. at 416, and the PUC exhaustively reviewed the application of the avoided-cost rule in this case.[7] The Commonwealth Court reasonably concluded that the PUC should calculate the capacity rate as of the date Milesburg executed the EEPA, inasmuch as West Penn submitted the EEPA to the PUC for approval and (as explained in point 1, *supra*) the PUC reasonably treated that submission as the equivalent of a petition by Milesburg for a mandatory-purchase agreement.

Because the application of FERC's "legally enforceable obligation" standard in the context of this case amounts to a

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[7] Both the Pennsylvania courts and FERC have recognized the effects of market variations on avoided-cost projections, concluding that the benefits and burdens to ratepayers of such variations are endemic to long-term contracts generally and are likely to balance out over time. See Pet. App. 29a ("no matter what time is used to fix EEPA purchase rates, ratepayers bear a risk that avoided costs will go down and QFs bear a risk that they will go up"); 45 Fed. Reg. 12,224 (1980) (explaining that FERC "believes that, in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out"). The putative expense to ratepayers that petitioners identify is thus not a sound basis for adopting a rule that requires calculation from the PUC order date, as petitioners urge.

decision under Pennsylvania law and procedure within the broad parameters set by the text and purposes of PURPA and FERC's regulations, no substantial federal issue is presented. The "legally enforceable obligation" standard is, to be sure, established by federal regulation, but under PURPA, it is state regulatory commissions and state law and procedure that determine how that standard is applied in particular settings. The Commonwealth Court concluded in the circumstances of this case that such an obligation can exist in Pennsylvania "even without a contract from a recalcitrant utility." Pet. App. 31a. The court reasoned that Milesburg was not sufficiently obligated as of the time of serious negotiations, *id.* at 30a, but once it signed the EEPA, it had done all it could to enter an agreement with West Penn, *id.* at 34a, 288a.[8]

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[8] The cases upon which petitioner relies are not to the contrary. The decisions of the Vermont Supreme Court in both *Vicon*, 572 A.2d at 1361, and *In re East Georgia Cogeneration Ltd. Partnership*, 614 A.2d 799, 803 (1992), support the decision below because they recognize the deference due to a state commission's discretionary judgments in determining avoided costs. The court in *East Georgia* affirmed the state Public Service Board's denial of the QF's petition on the ground that the QF's proposal, in contrast to Milesburg's agreement with West Penn, exceeded avoided costs at the time it was made. *Id.* at 804. Although petitioners rely on *Vicon* as requiring contracting at current avoided costs, the court there acknowledged that its holding was an exception to its general rule of determining avoided costs as of the time of the parties' agreement. 572 A.2d at 1360. Exceptional treatment was found to be required in *Vicon* to ensure that the utility's own delay did not alter the contract price to the detriment of the QF. *Ibid.*

Idaho implemented PURPA by establishing a fixed schedule of energy (but not capacity) rates applicable to all QFs. The court in *A.W. Brown Co.* v. *Idaho Power Co.*, 828 P.2d 841 (Idaho 1992), declined to apply an old schedule to a proposed hydroelectric QF because no obligation existed before the new schedule came into effect. All the QF had done at that stage

Federal law may place some outer limit on the latitude of a state commission to identify a point at which a QF has a "legally enforceable obligation" under its system of public utility regulation, but this case presents no question of what that limit might be. The Pennsylvania courts' identification of the February 25, 1987, date on which the EEPA was signed, is fully consistent with the pertinent FERC regulation, which refers to a "contract *or other* legally enforceable obligation." 18 C.F.R. 292.304(b)(5) (emphasis added). The alternative reference makes clear that an obligation need not rise to the level of a mutually enforceable contract before a state commission may find it adequate under PURPA as a reference point for rate calculation under a mandatory-purchase order. The preamble to FERC's regulations states that "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." 45 Fed. Reg. 12,224 (1980). See, *e.g.*, *Snow Mountain Pine Co.* v. *Maudlin*, 734 P.2d 1366, 1371 (Or. Ct. App.) (interpreting regulation to mean that a QF "has the power to determine the date for which 'avoided costs' are to be calculated by tendering an agreement that obligates it to provide power"), review denied, 739 P.2d 571 (Or. 1987).

Petitioners point to no authority for their current position that rates must be forecast as of the date of the PUC's order mandating purchase. Such a rule is by no means required by the statute or regulations. Indeed, a rule that no legally enforceable obligation exists until the PUC issues its order could prove unworkable, because it would require a QF to speculate about when the PUC would render its decision and what rates might then be applied. In evaluating whether it

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was to send a letter asking about rates and to receive a form letter from the utility in reply. *Id.* at 843.

would be worthwhile to petition for a compelled purchase, the QF would thus be unable to rely on a locked-in rate based on an existing projection of future avoided costs.

3. The proposed amendments to Pennsylvania's PURPA regulations would, if adopted, substantially change the law in Pennsylvania establishing utilities' avoided costs for purposes of setting the rates to which QFs are entitled under PURPA. See 24 Pa. Bull. 4091-4103 (1994); page 4, *supra*. The questions petitioners present would be obviated, or at least significantly affected, by the new regulations. Those questions are thus unlikely to be of recurring importance even in Pennsylvania, and for that additional reason do not warrant this Court's review.[9]

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[9] West Penn, Armco and Allegheny Ludlum have filed two other certiorari petitions seeking review of Pennsylvania Commonwealth Court orders involving two other proposed QF projects. *West Penn Power Co.* v. *Pennsylvania Pub. Util. Comm'n*, No. 93-1535 (filed Mar. 29, 1994) (involving the Shannopin project); *West Penn Power Co.* v. *Pennsylvania Pub. Util. Comm'n*, No. 94-7 (filed July 1, 1994) (involving the Burgettstown project). The power purchase agreement in each case was, like the Milesburg agreement, submitted for PUC review and subjected to regulatory delays unforeseen by the QF and beyond its power to control. The PUC in each case relied on the same rationale, invoking West Penn's purchase obligation under PURPA, and finding that a legally enforceable obligation existed when the QF responded to the utility's projected needs by agreeing to sell power on specified terms. The petitions raise essentially the same questions as the petition in this case, and neither presents any additional reason for the Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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